Supreme Court, U.S.
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In The

Supreme Court of the United States

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF PSYCHOANALYSIS, CEDRUS MONTE, ALLAN D. SOWERS, and LIONEL CORBETT,

Petitioners,

v.

CALIFORNIA BOARD OF PSYCHOLOGY'S EXECUTIVE OFFICER THOMAS O'CONNOR and BOARD MEMBERS MARTIN GREENBERG et al., and BILL LOCKYER, CALIFORNIA STATE ATTORNEY GENERAL,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

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QUESTION PRESENTED BY RESPONDENTS (rephrased)

Whether the Court of Appeals erred in applying First Amendment scrutiny to California's scheme for licensing psychoanalysts, instead of applying only the Fourteenth Amendment rational basis test.

QUESTIONS PRESENTED BY PETITIONERS

Whether the Court of Appeals erred in holding that the "licensing scheme passes First Amendment scrutiny" for content-neutral laws, without finding or requiring respondents to prove that it is reasonable, beneficial, and narrowly tailored.

Whether California's licensing scheme is content and viewpoint based, when:

(a) It restrains only speech with psychological content;

(b) Its goal is to regulate "wise . . . counseling" and the emotive impact of speech on willing listeners;

(c) Its method is to coerce unwilling psychoanalysts to study non-psychoanalytic viewpoints for years.

Whether California's scheme for licensing psychoanalysts is a prior restraint on pure speech that presumptively violates the First and Fourteenth Amendments to the United States Constitution.

1. Respondents question whether the Court of Appeals erred in applying First Amendment scrutiny at all.

Respondents do not engage the points and authorities in the Petition. Instead, they argue that the Court of Appeals' decision can be affirmed on another ground, one that itself raises constitutional issues that also merit review. Respondents phrase their question in material part as follows:

> "Whether California's mental health licensing scheme passes **First Amendment scrutiny** when, as the Court of Appeals ruled, * * * 'the licensing scheme is **rationally related** to California's interest in protecting the mental health and safety of its citizens.' "

Opposition Brief at i (emphasis added), *quoting* Petition Appendix A ("App A") at page 14a.

That question should be rephrased for two reasons. First, it wrongly implies that the rational basis test *is* "First Amendment scrutiny," when it is "Fourteenth Amendment scrutiny" (*see* App A at 11a). The ruling on the rational basis test quoted in respondents' question is from the court's analysis of petitioners' Fourteenth Amendment claims, not their First Amendment claims. *See* App A at 14a.

Second, respondents wrongly suggest that California's entire "mental health licensing scheme" is at issue, when petitioners challenge only the scheme's restraint on their private practice of psychoanalysis. Heightened scrutiny may apply to that restraint but still not apply to

other aspects of the licensing scheme, such as its regulation of psychometric or behavioral psychology, or of publicly funded health services.

Properly phrased, the question presented by respondents is whether the Court of Appeals erred in applying First Amendment scrutiny at all to California's licensing scheme for psychoanalysts.

2. This case presents important questions on the scope of First Amendment protection for the emotive impact of speech and professionals who specialize in it.

This Court has often held that the First Amendment protects the "primary effect" and "direct impact" of speech, including "the emotive impact of speech on its audience." *See* Petition at 18-19, *quoting Reno v. ACLU*, 521 U.S. 844, 868 (1997) and *Boos v. Barry*, 485 U.S. 312, 321, 334 (1988). That impact includes the potential for "psychological damage." *Boos v. Barry*, 485 U.S. at 321 (1988). Respondents' Brief does not contest that.

Indeed, this Court has held that the First Amendment protects even patently offensive speech by hateful individuals who intend to inflict severe emotional distress. *See, e.g., Hustler Magazine v. Falwell*, 485 U.S. 46 (1988); *Madsen v. Women's Health Center*, 512 U.S. 753, 774 (1994); *National Socialist Party v. Village of Skokie*, 432 U.S. 43 (1977).

Yet respondents essentially argue that the First Amendment does *not* protect insightful speech by highly educated, well-meaning individuals whose only intent is

to *relieve* emotional suffering and depression by promoting insight, personal integration and spiritual growth. That simply makes no sense.

Respondents rely on the Court of Appeals' statement that psychoanalytic " 'treatment of emotional suffering and depression[is] *not* speech,' " Opposition Brief at 3, *quoting* App A at 21a-22a (and App B at 43a), even though speech is the *only* means employed. *See* Petition at App E. *See generally,* Sigmund Freud, *The Question of Lay Analysis* (1926), translated and edited by J. Strachey (W.W. Norton & Co., New York: 1978) at ch. 6 pp. 68-69 ("analysis * * * consists only in talking and an exchange of information"); M. Gill and I. Hoffman, *Analysis of Transference Volume II: Studies of Nine Audio-Recorded Psychoanalytic Sessions,* (International Universities Press, Inc., New York: 1982).

The notion that the therapeutic effect of speech is "*not* speech" finds no support in Supreme Court precedent, and is inconsistent with the precedent cited above. The Court of Appeals' statement to that effect is an important error that this Court should review.

Respondents also argue that First Amendment scrutiny never applies to professional licensing schemes because speech is merely "incidental" to any profession in which one "takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client." Opposition Brief at 4, *quoting Lowe v. S.E.C.,* 472 U.S. 181, 232 (1985) (White, J., concurring).

First, this Court has never squarely ruled on the question of when heightened First Amendment scrutiny applies to the licensing of professions. The issue has been

addressed by members of this Court primarily in concurring opinions by Justice White in *Lowe* and Justice Jackson in *Thomas v. Collins*, 323 U.S. 516, 544-548 (1945). This case presents a timely opportunity for this Court to fully address that important issue.

Second, Justice White also stated that "the principle that the government may restrict entry into professions * * * has never been extended to encompass the licensing of speech *per se*," and he agreed that in prior cases "the distinguishing factor was whether the speech in any particular case was 'associat[ed] . . . with some other factor which the state may regulate so as to bring the whole within official control.' " 427 U.S. at 229-230, 231-232, *quoting Thomas v. Collins*, 323 U.S. at 547 (Jackson, J., concurring).

Psychoanalysis is not associated with any non-speech factor that justifies bringing it within official control. The only "affairs" that psychoanalysts take "in hand" are thoughts, feelings and emotions. Clients have First Amendment rights in those affairs. The government may not regulate them. Justice White was certainly not referring to psychotherapy when he characterized speech as incidental to some professions. He was referring to advice on clients' financial, legal and medical affairs. Such advice is closely associated with non-speech "factors" such as stock transactions, legal proceedings, medicine and surgery that "the state may regulate so as to bring the whole within official control." That is a key distinction between those professions and psychoanalysis.

Respondents' contention that the "practice of law is almost exclusively speech" (Opposition Brief at 5) ignores the close association between lawyers' speech and the conduct of clients, courts and law enforcement officers that the government may regulate, and that justifies regulation of the profession as a whole. In contrast, legal advice without that close association may be protected by the First Amendment. *See, e.g., United States v. Freeman*, 761 F.2d 549, 551 (9th Cir. 1985) (Opinion by Kennedy, J.) (First Amendment defense applies to defendant accused of giving illegal tax advice unless the "speech is so close in time and substance to ultimate criminal conduct that no free speech defense is appropriate"), *cert. den.* 476 U.S. 1120 (1986).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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